No. 80-766

In the Supreme Court of the United States

OCTOBER TERM, 1980

LESLIE ANDERSON AND LEONARD MOONEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend (1) that their conduct did not come within the reach of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, and (2) that the reversal of their RICO convictions rendered the initial joinder of their offenses retroactively improper under Fed. R. Crim. P. 8(a) and (b).

1. Following a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner Anderson was convicted on one count of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c) (Count I); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count II); four counts of travelling in interstate commerce in aid of a racketeering enterprise, in violation of 18 U.S.C. 1952 and 2 (Counts

V, VI, IX, and XVI); and 16 counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts III, IV, VII, VIII, X-XV, XVII, XIX, XXI, XXIII, XXVII, and XXVIII). Petitioner Mooney was also convicted on the RICO counts and, in addition, on one count of interstate travel in aid of a racketeering enterprise (Count XVI) and 10 counts of mail fraud (Counts XVII-XXVI). Petitioner Anderson was sentenced to concurrrent one-year terms of imprisonment on Counts I, II, III, and V, and was fined $5,000 on Count V. Petitioner Mooney was sentenced to concurrent terms of six months' imprisonment on Counts I, II, XVI, and XVII, and was fined $7,000 on Count XVI. On the remaining counts, the court suspended imposition of sentence and placed both petitioners on probation for two years, to run consecutively to their terms of imprisonment on Count I.

The court of appeals reversed in part and affirmed in part (Pet. App. 1a-36a). It reversed the RICO convictions of both petitioners on the ground (Pet. App. 29a) that the government had failed to establish an "enterprise" consisting of "an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts [of racketeering]." The court affirmed petitioners' convictions on the remaining counts, finding that joinder was proper without regard to the RICO counts and that the district court had not abused its discretion in denying a severance (*id.* at 31a-32a).

2. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 4a-5a). In brief, it showed that petitioners were county administrators in Arkansas who joined in a "kickback" scheme with Paul Baldwin, a construction equipment salesman. Each petitioner received 10 percent of the price of goods purchased by the county from Baldwin. In addition, petitioners approved payment

to Baldwin for equipment that they knew the county had never bought; in return, they received 50 percent of the net amount.

3. Petitioners first note (Pet. 7-10) that a conflict exists among the circuits concerning the scope of the RICO statute. As discussed in our petition for writ of certiorari in *United States* v. *Turkette*, No. 80-808 (filed Nov. 19, 1980),[1] we agree that the courts of appeals are in disagreement on the question whether a group of individuals associated in fact to engage in exclusively illegal activities is an "enterprise" within the meaning of the statute. However, the court of appeals in this case accepted petitioners' contention that the RICO statute was improperly applied to their conduct. In view of the reversal of their RICO convictions, petitioners have no "personal stake" in the question of the proper construction of the term "enterprise." See *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Accordingly, there is no occasion to review the issue in this case regardless of the outcome in *Turkette*.

4. Contrary to petitioners' contention (Pet. 10-14), the reversal of their RICO convictions did not result in misjoinder, since there was a valid basis for joinder even in the absence of the RICO counts. Under Fed. R. Crim. P. 8(a), two or more offenses may be charged in the same indictment if they are based on "two or more acts or transactions connected together or constituting parts of a common scheme or plan." Similarly, Rule 8(b) provides that the joinder of two or more defendants is proper where "they are alleged to have participated in the * * * same series of acts or transactions constituting an offense or offenses." Here, as the court of appeals correctly held (Pet. App. 31a), all the instances of mail fraud and interstate travel charged in the

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[1]A copy of the *Turkette* petition is being sent to counsel for petitioners.

indictment were part of the same fraudulent scheme involving kickbacks and bogus vouchers. Moreover, apart from the RICO counts, petitioners were jointly indicted in five of the substantive counts (Counts XVI, XVII, XIX, XXI, and XXIII); the fact that only one of the petitioners was charged in each of the other counts does not demonstrate misjoinder, since Rule 8(b) expressly provides that "all of the defendants need not be charged in each count."

United States v. *Sutton*, 605 F. 2d 260 (6th Cir. 1979), and *United States* v. *Turkette*, Nos. 79-1545 and 79-1546 (lst Cir. Sept. 23, 1980), petition for cert. pending, No. 80-808 (filed Nov. 19, 1980), upon which petitioners rely, do not support their position. First, the panel opinion in *Sutton* was vacated when the Sixth Circuit granted rehearing en banc, and the full court has now reversed the panel's decision on the scope of RICO, thereby obviating the joinder issue. See Nos. 78-5134 to 78-5139, 78-5141 to 78-5143 (Dec. 3, 1980). But more importantly, the indictment in each of those cases charged two or more separate and distinct sets of offenses, and the appellate court concluded that the RICO counts provided the only basis for joining the otherwise unrelated substantive offenses. Here, by contrast, the court below held that the RICO counts were not necessary to justify joinder under Rule 8, since each count involved "a closely related series of acts or transactions" (Pet. App. 31a).[2]

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[2]In our petition in *Turkette* we argue that, even where the RICO count is the only basis for joinder, reversal on that count does not render the initial joinder improper in the absence of bad faith on the government's part in charging the RICO violation. We also argue that, contrary to petitioners' assertion here (Pet. 10), misjoinder is not "prejudicial per se," but rather is subject to the harmless-error standard of Fed. R. Crim. P. 52(a). Because the joinder in this case was justified wholly apart from the RICO charge, it is not necessary for the Court to hold the instant petition pending disposition of the petition in *Turkette*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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